UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEPHEN J. MCGUIRE
CAPTAIN (O-3), U.S. MARINE CORPS

NMCCA 201000611
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 June 2010.
Military Judge: LtCol Gregory L. Simmons, USMC.
Convening Authority: Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Col K.J. Brubaker, USMC; **Addendum:** Maj Brett M. Wilson, USMC.
For Appellant: Mr. Peter J. Van Hartesveldt, Civilian Counsel; Maj Jeffrey R. Liebenguth, USMC.
For Appellee: Capt Mark V. Balfantz, USMC.

31 January 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PAYTON O'BRIEN, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of two specifications of conduct unbecoming an officer and two specifications of fraternization, violations of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934. The convening authority approved the adjudged sentence of confinement for four years and a dismissal.

The appellant advances multiple assignments of error: (1) the novel language in Specification 1 of Charge II (conduct unbecoming) fails to state an offense; (2) the military judge erred in calculating the maximum punishment for Specification 1 of Charge II (conduct unbecoming); (3) trial defense counsel were ineffective by acceding to a seven-year maximum confinement sentence for conduct unbecoming charged under Specification 1 of Charge II; (4) the military judge erred by not instructing the members on the defense of voluntary intoxication for Specification 1 of Charge II; (5) the military judge erred by admitting the appellant's statement to an emergency room doctor in contravention of Military Rule of Evidence 513; (6) Specification 2 of Charge II (conduct unbecoming) and Specification 1 of Charge III (fraternization) are multiplicious for findings, or an unreasonable multiplication of charges; and, (7) the Article 134 fraternization specifications fail to state offenses because they do not expressly allege the terminal element. We accepted supplemental briefs from both parties on the last assignment of error in light of the recent Court of Appeals for the Armed Forces (C.A.A.F.) decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

After reviewing the record of trial, and with the benefit of the parties' briefs and oral argument, we agree with the appellant that the military judge erred in calculating the maximum punishment for Specification 1 of Charge II and that Specification 2 of Charge II and Specification 1 of Charge III are an unreasonable multiplication of charges. After our corrective action, we find that the remaining findings of guilty and reassessed sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The charges before us stem from the relationship the appellant, an officer and helicopter pilot, fostered with his unit co-worker, Corporal K, a helicopter crew chief, while both were part of the same squadron at Marine Corps Air Station, Miramar, California. The appellant, Corporal K, and Lance Corporal W all went on an overnight social camping trip at a wildlife park. Because the appellant's enlisted companions were under the legal drinking age, the appellant purchased alcoholic drinks for them prior to the trip. The three hiked in the park during the day and made camp together once night fell. Thereafter, they drank alcohol and conversed around a campfire

before falling asleep. During the trip, the appellant refused to honor the differences in rank, insisting his enlisted companions call him by his first name.

Weeks after camping together, the appellant joined Corporal K and his wife at a community hot tub in Corporal K's apartment complex. The appellant brought beer with him and the three drank alcoholic beverages together. Once the alcohol was consumed, they went into Corporal K's apartment, where the appellant and Corporal K drank large quantities of vodka and played video games together. The appellant arranged with Corporal K's wife to sleep in the living room because he felt unsafe walking home.

Corporal K's wife eventually retired to the marital bedroom, leaving the appellant to sleep in the living room and Corporal K on the living room floor where he had passed out. Corporal K later awoke on the futon in his living room to his pants being pulled down and a hand on his genitals. Corporal K then got up, fell, and was picked up and placed on the futon face down. Corporal K then felt a pain in his anus as if something had penetrated it. Simultaneously, Corporal K heard the appellant say he was homosexual.

Some days later, Corporal K reported the incident to his command and an investigation ensued into the appellant's alleged conduct. The appellant's commanding officer (CO) had the appellant brought in to his office, at which time the CO told him he would be transferred because of the allegations. The appellant then made self-injurious gestures to his wrist with his pocket knife and car keys at which point his CO confiscated them. The appellant cut himself, drawing blood. Because of the appellant's reaction and out of concern for his well-being, the CO and the executive officer personally drove the appellant to the nearest Naval Hospital emergency room (ER). They arrived at the ER after the normal working hours of the hospital's mental health department.

After arriving at the ER, the appellant was seen by Lieutenant (LT) B, the duty doctor. As part of his normal duties as an ER doctor, LT B conducted a physical examination and a mental health screening examination to determine whether he should refer the appellant to mental health. During the course of the examination, the appellant made admissions to LT B concerning the alleged offenses. LT B was a general medical officer, not a psychiatrist, psychologist, psychotherapist, or clinical social worker.

Terminal Element in the Fraternization Specifications in light of *United States v. Fosler*

Due to the impact on the entirety of our decision, we begin with the appellant's last assignment of error: that the two fraternization specifications under Charge III fail to state an offense because they do not expressly allege a terminal element of Article 134.[1] The appellant contends that under the CAAF's reasoning in *Fosler*, we should set aside both general article convictions. We disagree.

Whether a charge and specification state an offense is a question of law that is reviewed *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)).

The elements of fraternization under Article 134, UCMJ, are:

> (1) That the accused was a commissioned or warrant officer;
> (2) That the accused fraternized on terms of military equality with one or more enlisted persons in a certain manner;
> (3) That the accused then knew the person or persons to be an enlisted member or members;
> (4) That such fraternization violated the custom of the accused's service that officers shall not

[1] Specification 1 reads: "In that Captain Stephen J. McGuire, USMC, Marine Aircraft Group 16, Third Marine Aircraft Wing, Marine Corps Air Station Miramar, California, on active duty, did, at or near San Diego, California, on or about 12 September 2008, knowingly fraternize with Corporal [K], United States Marine Corps, an enlisted person, on terms of military equality, to wit: drinking alcoholic beverages and getting drunk with the said Corporal [K], and sleeping at the said Corporal [K]'s residence, in violation of the custom of the Naval Service of the United States that officers shall not fraternize with enlisted persons on terms of military equality."

Specification 2 reads: "In that Captain Stephen J. McGuire, USMC, Marine Aircraft Group 16, Third Marine Aircraft Wing, Marine Corps Air Station Miramar, California, on active duty, did, at or near Cleveland National Forest, Ramona, California, during August 2009, knowingly fraternize with LCPL [W], United States Marine Corps, and CPL [K], United States Marine Corps, enlisted persons, on terms of military quality, to wit: drinking alcoholic beverages and engaging in a camping and hiking trip with the said LCPL [W] and CPL [K], in violation of the custom of the Naval Service of the United States that officers shall not fraternize with enlisted persons on terms of military equality."

> fraternize with enlisted members on terms of military equality;
> (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 84(b).

In *Fosler,* the CAAF held that the general article specification alleging adultery in that case failed to state an offense because it did not allege the terminal element. The CAAF ruled that the adultery specification, which had been challenged at trial, did not, either expressly or by necessary implication, state a terminal element. *Fosler*, 70 M.J. at 226. Notwithstanding *Fosler*, on the facts of this case we resolve this assignment adversely to the appellant for two distinct reasons: (1) the appellant did not challenge the specifications at trial, and (2) the terminal element was necessarily implied in both specifications.

Fosler does not preclude the possibility that other specifications under Article 134 may be worded in a way as to imply the terminal element, thereby putting an accused on notice of the charge, even if the terminal element is not expressly included.[2] The CAAF differentiated between contested and uncontested courts-martial, and challenges to specifications made at trial and those first made on appeal. *Id*. at 230.

We interpret *Fosler* as requiring challenges to Article 134 to be reviewed under the same standards applied to all other substantive offenses under the UCMJ. *Fosler* did not alter any pre-existing standards for challenges to specifications. It instead addressed whether to apply those standards to *all* offenses. As such, the timing of the challenge to a specification is critical. The appellant in *Fosler* challenged the general article specification during his contested trial. "[I]n contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id.* (citation and footnote omitted). Because in *Fosler* the accused challenged the specification at trial, the CAAF reviewed "the language of the charge and specification more narrowly than [it] might at later stages." *Id.* at 232. "A

[2] We are not the only military court of criminal appeals to interpret *Fosler* in this way. See *United States v. Roberts*, 70 M.J. 550 (Army Ct.Crim.App. 2011).

flawed specification first challenged after trial, however, is viewed with greater tolerance than one which was attacked before findings and sentence." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) (citations omitted); *see also United States v. Whythe*, 1 M.J. 163 (C.M.A. 1975).

1. Liberal-Construction Rule

Unlike *Fosler*, the appellant before us first raises his challenge on appeal. "Although failure of a specification to state an offense is a fundamental defect which can be raised at any time, we choose to follow the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal." *Watkins*, 21 M.J. at 209 (footnote omitted). *See, e.g., United States v. Seher*, 562 F.3d 1344, 1356 (11th Cir. 2009) (holding an indictment challenged post-conviction should be construed in a liberal manner in favor of validity.); *United States v. Cox*, 536 F.3d 723, 726 (7th Cir. 2008) ("Tardily challenged indictments should be construed liberally in favor of validity") (internal citation omitted); *United States v. Teh*, 535 F.3d 511, 515-16 (6th Cir. 2008) (holding that an indictment unchallenged before appeal must be construed liberally in favor of sufficiency). Although a failure to object at trial does not waive the issue, we will follow the liberal-construction rule mirrored by most federal courts and read the specifications with maximum liberality and construe them in favor of validity.

In employing this post-conviction liberal construction rule, we note that United States courts have not been accommodating to post-conviction challenges, like the appellant's here, absent a showing of substantial prejudice, such as the indictment being "so defective that by no reasonable construction can it be said to charge the offense for which" the accused was convicted. *United States v. Jenkins-Watts*, 574 F.3d 950, 968 (8th Cir. 2009) (citation and internal quotation marks omitted); *see also Watkins*, 21 M.J. at 210 (citing *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965)); *United States v. Hart*, 640 F.2d 856, 857 (6th Cir. 1981) (holding that absent prejudice, a conviction first challenged post-trial will be affirmed unless the indictment cannot within reason be construed to charge a crime); *United States v. Avery*, 295 F.3d 1158, 1174 (10th Cir. 2002) ("Because of this liberal construction rule, an indictment challenged for the first time post-verdict may be found sufficient, even though that indictment would have been found wanting had it been challenged pre-verdict") (internal citation omitted). Accordingly, we will "liberally review the

specification to determine if a reasonable construction exists that alleges all elements either explicitly or by necessary implication." *United States v. Hackler*, __ M.J. __, No. 201100323, 2011 CCA LEXIS 371 at 6 (N.M.Ct.Crim.App. 22 Dec 2011).

In construing the specifications liberally, we conclude that they were reasonably constructed and notified the appellant that he must defend against the crime of fraternization. In doing so, we emphasize the notice the appellant received that fraternization is a crime in both the language of the specification, which itself alleges that fraternization erodes the custom of the Naval Service, and in service regulations that provide constructive notice to all members.[3] We make this determination while noting that neither specification as charged under Article 134 expressly alleges the terminal element. Moreover, the appellant never expressed confusion over the fraternization specifications. He never requested a bill of particulars; made no motion to dismiss the specification either pre-trial or during the trial proceedings; and lodged no objection to the fraternization elements in the military judge's findings instructions. We note that the military judge, in listing the elements within the finding instructions, included the "prejudice" and "discredit" aspects of the terminal elements of Article 134. The appellant did not object to what is arguably a major change, *see* RULE FOR COURTS-MARTIAL 603(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), and thus waived the objection. He did not request repreferral, reinvestigation, rereferral, or the statutory delay afforded between referral and trial. *See* Art. 35, UCMJ.

Furthermore, the trial defense counsel highlighted the fraternization charge in his opening statement[4] and then all but conceded convictions for fraternization in his closing argument before the members, stating "we are only here to contest two charges on that charge sheet. I said in my opening, I'll say it

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[3] *See* U.S. Navy Regulations, Art. 1165 (1990) (Unduly familiar personal relationships between officer and enlisted members that do not respect differences in grade or rank are prejudicial to good order and discipline and violate naval service traditions.); Marine Corps Manual (Change 3), Paragraph 1100.4 ("Personal relationships between officer and enlisted members that are unduly familiar and that do not respect differences in grade or rank constitute fraternization and are prohibited." Fraternization is prohibited when prejudicial to good order and discipline or of a nature to bring discredit on the Marine Corps).

[4] ". . . it takes two to fraternize. Fraternization is a two-way street, and you're going to see it in this case." Record at 602.

again: Charge I and the specification thereunder and Charge II, spec I. That [sic] why we're fighting today." Record at 1062. Accordingly, the appellant's own tactical decision to all but concede the fraternization convictions convinces us that he suffered no substantial prejudice. Lastly, the lack of prejudice is indicated further by the fact that the appellant did not think to make this argument at the trial level.

We hold that the failure to expressly allege the terminal elements in the specifications in this case does not overcome the deference given to the specifications after a post-conviction challenge absent a showing of prejudice. The unchallenged specifications can reasonably be construed to charge fraternization and they clearly put the appellant on notice as evidenced by his concession of the crimes at trial. Moreover, the evidence at trial fully supported his convictions and the members were properly instructed. Thus, we are satisfied that the appellant enjoyed what has been described as the "clearly established" right of due process to "'notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *Fosler*, 70 M.J. at 229 (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

2. Necessary Implication

As an additional matter, construing these specifications liberally, we find that the terminal elements in the fraternization specifications are necessarily implied. Pursuant to R.C.M. 307(c)(3) and *Fosler*, we examine the specifications to determine whether the terminal element is either expressly alleged or necessarily implied. We must determine whether the relevant "charging language [can] be interpreted to contain the terminal element such that an Article 134 conviction can be sustained?" *Fosler*, 70 M.J. at 229. As we have noted, the terminal element is not expressly alleged in either specification, but our analysis goes further. To determine whether the terminal element was necessarily implied we must interpret the text of the specification. *Id.*

We distinguish this case from *Fosler* because the texts of the specifications in this case necessarily imply both terminal elements. The *Fosler* court found that merely alleging the word "wrongfully" in the specification and listing it under Article 134 were insufficient to necessarily imply a terminal element. In the present case, however, in addition to listing the offenses under Article 134 and including terms of criminality, the language of these specifications also necessarily imply the

terminal elements. Violating "the custom of the Naval Service of the United States" inherently brings discredit to the Armed Forces. Similarly, "knowingly [fraternizing] on terms of military equality" prejudices good order and discipline because it undermines the officer's position over the enlisted member and erodes the officer-enlisted hierarchy in the unit. In fact, Marine Corps Manual, ¶ 1100.4, creates a blanket prohibition regarding officer and enlisted relationships that are unduly familiar and that do not respect differences in grade or rank precisely because they are prejudicial to good order and discipline. The definition of fraternization necessarily incorporates the reference to good order and discipline. In a military society where immediate obedience to orders, military decorum, tradition, custom, usage, and conventions of the Naval Service are vital to success, conduct, e.g., fraternization, which jeopardizes success, is prejudicial to good order and discipline. The Naval Service prohibits fraternization between officers and enlisted persons because such relationships undermine the authority of military officers, embolden subordinates to question orders, and ultimately, degrade the effectiveness of a unit. We are satisfied that the specifications necessarily imply the terminal element. We hold the appellant received the requisite due process notice and that both specifications under Charge II state an offense.

Failure to State an Offense Under Article 133.

The appellant avers that Specification 1 of Charge II, conduct unbecoming an officer and gentleman, fails to state an offense.[5] We disagree.

There are two elements to this offense: (1) the accused did or omitted to do certain acts; and (2) under the circumstances, the acts or omissions constituted conduct unbecoming an officer and gentleman. MCM, Part IV, ¶ 59(b). The appellant's assigned error focuses on the first element of the offense. He argues that the specification does not contain sufficient elements of

[5] The specification reads: "In that Captain Stephen J. McGuire, USMC, Marine Aircraft Group 16, Third Marine Aircraft Wing, Marine Corps Air Station Miramar, California, on active duty, did, at or near San Diego, California, on or about 12 September 2009, act in a manner unbecoming an officer and gentleman, to wit: by wrongfully engaging in sexual activity and/or sodomy with Corporal [K], while he knew or should have known that the said Corporal [K] was so significantly intoxicated and mentally and physically impaired as a result of said intoxication that a reasonable officer in the Naval service would have recognized that there was a substantial likelihood that he was incapable of knowingly and voluntarily consenting to sexual activity and/or sodomy."

criminality, the term “sexual activity” is vague and undefined, and the language of the specification is confusing and diluted. Appellant’s Brief of 28 Jan 2011 at 8-9.

A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice of the charge and protection against double jeopardy. *Crafter*, 64 M.J. at 211. *See* R.C.M. 307(c)(3). The appellant challenges this specification for the first time on appeal. Consequently, we will again follow the liberal-construction rule discussed above and read the specification with maximum liberality and construe it in favor of validity.

At trial, the defense moved to strike the sodomy language from the original specification. Record at 990. The military judge granted the defense request and struck the “and/or sodomy” language from the specification to resolve the issues of multiplicity and duplicity with the sodomy charge. *Id.* at 1028. The defense registered no remaining objection to the “sexual activity” language.

During findings instructions, the military judge instructed the members as to the conduct unbecoming an officer and gentleman offense substantially as follows:

> (1) The accused wrongfully engaged in sexual activity with Corporal K;
> (2) At the time he knew or should have known that the said Corporal K was so significantly intoxicated and mentally and physically impaired as a result of said intoxication that a reasonable officer in the Naval Service would have recognized that there was a substantial likelihood that Corporal K was incapable of knowingly and voluntarily consenting to the sexual activity; and
> (3) Under the circumstances, the accused’s conduct was unbecoming an officer and a gentleman.

Id. at 1043.

Here, the specification alleges sufficient words of criminality for an Article 133 offense: the appellant “*acted in a manner unbecoming* of an officer and gentleman . . . by *wrongfully* engaging in sexual activity . . . with Corporal [K].” There is no question that the specification’s language sufficiently described the alleged conduct as criminal.

Moreover, the appellant received adequate notice because, as noted above, the specification alleged each element of the offense. In essence, the appellant faced a charge that he engaged in sexual activity with an enlisted member who the appellant knew or should have known was too intoxicated to consent, which constituted conduct unbecoming an officer and gentleman. The Government's inclusion of additional requirements in the specification merely made proving its case more difficult; doing so did not compromise the notice to the appellant, which was more than adequate.

We are not persuaded by the appellant's argument that the specification needed to allege the specific acts of sexual activity to adequately place him on notice. Although the appellant contends now on appeal that the term "sexual activity" within the specification is vague and undefined, we note that the appellant's apparent concerns did not compel him to request a bill of particulars or raise this issue at trial. Consequently, we follow a liberal-construction rule in favor of validity. While the military judge did not provide the members with a definition of the term "sexual activity" during his findings instructions, we are convinced the members could appropriately draw its meaning from its common usage and meaning and apply it to the facts. Terms "'generally known and in universal use do not need judicial definition.'" *United States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000) (quoting *United States v. Shepard*, 4 C.M.R. 79, 84 (C.M.A. 1952)). The appellant lodged no objection to the military judge's instructions as to this particular matter, nor did he request a definition of "sexual activity" be included. Absent a defense request for further definitions, we will not disturb an instruction that omits the definition of such a generally known term. *United States v. McDonald*, 20 C.M.R. 291 (C.M.A. 1955). In fact, the trial defense counsel acknowledged during an Article 39(a), UCMJ, instructions conference that "sexual activity" was "tantamount to" sexual contact as defined under Article 120. Record at 1023. The trial defense counsel's understanding of the term belies the appellant's lack of notice argument before us.

In addition, the term "sexual activity" inherently means activity of a sexual nature. "Sexual activity" is likened to "sexual relations," including sexual intercourse or physical sexual activity that does not necessarily culminate in intercourse but may involve the touching of another's breast, vagina, penis, or anus. BLACK'S LAW DICTIONARY, 1379 (7th ed., 1999). In determining whether the appellant engaged in "sexual activity," the members were free to use the facts provided at

trial, including the appellant's grabbing of Corporal K's penis and penetration of Corporal K's anus. We disagree with the appellant's broad contention that "sexual activity" could include mere hand holding, watching pornography, or talking about sex. Even assuming it was error for the military judge to fail to provide a definition as to "sexual activity," the appellant has not demonstrated that the absence of the definition constituted material prejudice to his substantial rights. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008); *see* Art. 59(a), UCMJ.[6] We believe the common meaning and general understanding of the term "sexual activity" includes the acts the alleged victim testified about, that is, the grabbing of his genitals and the penetration of his anus.

As to the remaining *Dear* factor, double jeopardy, we find that the appellant is protected against further prosecutions for the conduct of which he was convicted. The specification adequately listed when and where the offense occurred as to bar future prosecution for the same conduct. Therefore, construed liberally, the appellant was sufficiently informed of the Article 133 charge and the elements of that charge against which he had to defend and is protected from double jeopardy.

While we agree with both parties that the charged specification could have been better drafted, it is well-established that: "[t]he true test of the sufficiency of [a specification] is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet . . . ." *Crafter*, 64 M.J. at 212 (quoting *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)). We have conducted our review mindful that the criminal conduct punished by an Article 133 offense is "the act of committing dishonorable or compromising conduct, regardless of whether the underlying conduct constitutes an offense under the UCMJ." *United States v. Ashby*, 68 M.J. 108, 115 (C.A.A.F. 2009) (citation omitted); *cert. denied*, 130 S. Ct. 1536 (2010). We find that the specification contained sufficient words of criminality, included each element of the offense, sufficiently apprised the appellant of what he must defend against, and protected him from double jeopardy. The military expects its officers to behave in a certain fashion with "moral attributes common to the ideal officer and the perfect gentleman." MCM, Part IV, ¶ 59c(2). The appellant's

[6] As the appellant failed to object to the judge's instructions or lack of instructions in this regard, failure to object to an instruction given or omitted forfeits the objection absent plain error. R.C.M. 920(f).

conduct in engaging in sexual activity with an intoxicated enlisted Marine was "dishonorable or compromising," as is the focus of an Article 133 charge. *United States v. Conliffe*, 67 M.J. 127, 132 (C.A.A.F. 2009).

Maximum Sentence Miscalculation

The appellant next asserts that the military judge erred in calculating his maximum punishment by finding Specification 1 of Charge II, the Article 133 offense, "analogous" to an the offense of abusive sexual contact under Article 120(h). Although seven years is the maximum allowable confinement for abusive sexual contact, the appellant contends that Specification 1 of Charge II is not analogous to abusive sexual contact. He offers a one-year limit to confinement instead. We find that the military judge did err in calculating the specification's maximum confinement. Consequently, we will reassess the sentence.

The maximum punishment authorized for a particular offense is a question of law we review *de novo*. *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011). When an erroneous view of the law influences a military judge's sentencing determination, that decision constitutes an abuse of discretion. *Id*. Here, the military judge abused his discretion by incorrectly using the seven-year confinement limit under what he mistakenly thought was an analogous abusive sexual contact offense, rather than the correct one-year confinement limit under Article 133, conduct unbecoming an Officer and gentleman. Although we recognize that the defense counsel did not object to the specification's maximum punishment proposed at trial, our inquiry does not end there.

Contrary to the military judge's finding, abusive sexual contact was not the most analogous offense to the appellant's Article 133 conviction for sentencing purposes. The elements of the Article 133 offense, listed above, do not share those elements from an Article 120(h) offense. The elements of abusive sexual conduct are that: (1) the accused engaged in sexual contact with another person, or caused sexual contact with or by another person, and (2) the other person was substantially incapacitated, or substantially incapable of appraising the nature of the sexual contact, or substantially incapable of declining participating in the sexual act, or substantially incapable of communicating unwillingness to engage in the sexual contact.

Rather than incorporating this very specific language in its Article 133 specification, the Government alleged novel language, including "significantly intoxicated," "a reasonable officer in the Naval service," "mentally and physically impaired," and "substantial likelihood," which we find nowhere in this Code subsection.[7] Because the Government did not incorporate the language or elements of abusive sexual contact for the Article 133 specification, we do not find the two offenses analogous. Accordingly, the maximum sentence authorized for the specification is the statutory limit under Article 133: confinement for one year, total forfeiture of pay and allowances, and a dismissal. The miscalculation by the military judge significantly increased the appellant's punitive exposure. Although the appellant did not object at trial, we find that this miscalculation was plain or obvious, materially prejudiced a substantial right, and thus was plain error. We will take corrective action by reassessing the sentence below.

Ineffective Assistance of Counsel

The appellant raised an ineffective assistance of counsel claim in the event that we determine his trial defense counsel had waived the issue in the second assignment of error by not objecting at trial to the miscalculated maximum sentence. Because of our holding that the maximum sentence was miscalculated and provision of appropriate relief below, we need not conduct an analysis for ineffective assistance of counsel.

Voluntary Intoxication Instruction

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[7] When instructing the members on the Article 133 specification, the military judge instructed on what he termed the second of three elements:

> Second, that at the time he knew or should have known that the said Corporal [K] was so significantly intoxicated and mentally and physically impaired as a result of said intoxication that a reasonable officer in the Naval Service would have recognized that there was a substantial likelihood that Corporal [K] was incapable of knowingly and voluntarily consenting to sexual activity."

Record at 1043. While the military judge called this an "element," we do not find it to be an element. Rather, we find it to be a further specific factual circumstance alleged by the Government as to the appellant's conduct. We also note that the definition of "significantly intoxicated" that the military judge provided the members appears to have been taken verbatim from the "substantially impaired" definition under Article 120(e) aggravated sexual contact, not abusive sexual contact under Article 120(h).

Next, the appellant asserts that the military judge erred by denying the defense request for a voluntary intoxication instruction for the Article 133 offense. Specifically, the appellant claims that the wrongfulness and knowledge elements in the specification required such an instruction. We note that at trial, the defense requested a voluntary intoxication defense instruction, arguing that Article 120(h), abusive sexual contact, is a specific intent crime, and even though charged as an Article 133 offense, it remained a specific intent crime requiring a voluntary intoxication defense instruction. Record at 995. The defense also argued for the voluntary intoxication defense instruction as to the "knowledge" element. *Id.* at 1022-23, 1025. Although the former basis is not raised on appeal, we will address it herein, as it is connected to the issue raised.

Whether a jury was properly instructed is a question of law we review *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). "'The military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law.'" *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (quoting *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)). Generally, a military judge has substantial discretionary power to decide whether to issue a jury instruction. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010) (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)).

Specification 1 of Charge II alleges the appellant "wrongfully [engaged] in sexual activity with Corporal [K] . . . *while he knew or should have known* that the said Corporal [K] was so significantly intoxicated and mentally and physically impaired as a result of said intoxication that . . ." there was a substantial likelihood he could not consent to sexual activity. (Emphasis added). Contrary to the appellant's argument, the word "wrongfully" merely indicates criminality; it does not create a specific intent requirement. R.C.M. 307(c)(3), Discussion at ¶ (G)(ii). The question is whether the language, "while he knew or should have known," necessitated a voluntary intoxication instruction. We hold that it did not.

Criminal conduct sought to be punished by an Article 133 offense is the "act of committing dishonorable or compromising conduct, regardless of whether the underlying conduct constitutes an offense under the UCMJ." *Ashby*, 68 M.J. at 115 (citation omitted). The test for a violation under Article 133 is "whether the conduct has fallen below the standards

established for officers." *United States v. Diaz*, 69 M.J. 127, 135 (C.A.A.F. 2010) (citation and internal quotation marks omitted). While not every act of a sexual nature committed by an officer with an enlisted person might qualify as an Article 133 offense, certain circumstances could rise to the level of conduct unbecoming an officer and gentleman. As Article 133 explains, "[t]here are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecently, indecorum, lawlessness, injustice, or cruelty." MCM, Part IV, ¶ 59c(2).

Voluntary intoxication is not a defense to a general-intent crime, but it may raise a reasonable doubt about actual knowledge, specific intent, willfulness, or premeditation when they are elements of a charged offense. *See* R.C.M. 916(l)(2). Specific intent "involves a further or ulterior purpose beyond the mere commission of the act." *United States v. Bryant*, 39 C.M.R. 380, 382 (A.C.M.R. 1968) (citation omitted). Generally, charging an enumerated substantive offense as conduct unbecoming will not transform the conduct unbecoming offense into a specific intent crime, unless the underlying criminal offense itself contains an element of specific intent. While there are certain conduct unbecoming offenses that qualify as specific intent crimes because the underlying substantive offense contains a specific intent element (i.e., attempted larceny: specific intent to steal; conspiracy to rape: specific intent to rape; assault with intent to commit murder: specific intent to kill), abusive sexual conduct is not one of those offenses.

In this case, although not a course of action we would recommend, the Government chose to charge the appellant with conduct unbecoming an officer and gentleman while borrowing liberally from another article of the UCMJ, that is, Article 120(h), abusive sexual contact. In an effort to provide greater specificity to the appellant, the Government alleged numerous factual circumstances in the specification through the use of the language "while he knew or should have known that the said Corporal [K] was so significantly intoxicated and mentally and physically impaired as a result of said intoxication . . . ." While this language in the specification was surplusage, unnecessary, increased the Government's burden, and inured to the appellant's benefit, the language did not transform the offense into a specific intent crime.

While the appellant claimed at trial that this offense was a specific intent crime, we find no such language that qualifies

as “specific intent” in the statute criminalizing abusive sexual contact, in the elements of that crime as set forth in the MCM or in the Military Judges’ Benchbook instructions on abusive sexual contact. In fact, “[t]he language of the statute does not refer to any specific state of mind on the part of the person” committing the sexual contact and does not ”require a particular state of mind as a condition for conviction.” *United States v. Lord,* 32 C.M.R. 78, 82-83 (C.M.A. 1962). Without doubt, there are crimes under Article 120 that contain an element of specific intent. However, with regard to this particular Article 120 offense borrowed by the Government in its Article 133 offense, there is no additional element of specific intent that needs to be proven beyond the other elements of the crime as delineated in the statutory language or in the elements section of the MCM. Because abusive sexual contact is not a specific intent crime, a voluntary intoxication defense instruction was not warranted on this basis.

With regard to the knowledge “element” that the appellant claims exist in this case, we disagree with the appellant’s assertion. Whether the appellant “should have known” about Corporal [K]’s level of intoxication is an objective standard. It would have been no defense to this conduct unbecoming charge for the appellant to claim he was so intoxicated that he could not meet an objective standard of what he should have known.

Assuming, *arguendo*, that the military judge erred in not providing the instruction, we find that such error did not materially prejudice the substantial rights of the appellant. The evidence presented to the members established beyond a reasonable doubt that the appellant’s sexual activity with this enlisted Marine under these circumstances constituted conduct that was unbecoming an officer and gentleman and that he was not operating either through ignorance or through a mistaken belief as a result of his alcohol consumption that the victim consented to the sexual acts.

Conduct unbecoming, as charged in this case, does not require an extensively high level of cognitive functioning. The military expects its officers to behave in a certain fashion, with “moral attributes common to the ideal officer and the perfect gentleman.” MCM, Part IV, ¶ 59c(2). Morality does not require a high level of cognition.

Psychotherapist Privilege Under Military Rule of Evidence 513

The appellant next claims that the military judge erred by allowing his ER doctor, LT B, to testify to statements the appellant made during his mental health screening. We disagree.

Upon referral of charges, the appellant challenged the admissibility of his statements to LT B in a pretrial motion, arguing his statements were protected by the MILITARY RULE OF EVIDENCE 513, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) psychotherapist privilege. The military judge denied the motion, finding the MIL. R. EVID. 513 protections did not apply because LT B was not a psychotherapist or assistant to a psychotherapist. The military judge's detailed findings of facts and conclusions of law are set forth in Appellate Exhibit LXXXVI.

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006). The military judge's "'findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record.' We review conclusions of law *de novo.*" *United States v. Owens,* 51 M.J. 204, 209 (C.A.A.F. 1999) (quoting *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996)). This standard for our review of the military judge's findings of fact is a strict one, requiring more than a mere difference of opinion. *United States v. McElhaney,* 54 M.J. 120, 130 (C.A.A.F. 2000). Additionally, we must consider the evidence "in the light most favorable" to the "prevailing party." *Reister,* 44 M.J. at 413.

Under the Military Rules of Evidence, which provide for a limited psychotherapist privilege for the military, a patient ordinarily has a privilege to prevent a psychotherapist or psychotherapist assistant from disclosing confidential communications the patient made to facilitate diagnosis or treatment of the patient's mental or emotional condition. MIL. R. EVID. 513(a). An assistant to a psychotherapist must be either directed by a psychotherapist or assigned to assist one in providing professional services. MIL. R. EVID. 513(b)(3).

Here, the appellant enjoys no privilege under MIL. R. EVID. 513 because LT B was not a psychotherapist or an assistant to a psychotherapist, and the appellant was not laboring under the mistaken belief that LT B was such. LT B was the duty ER doctor. He was not directed by, assigned to, or supervised by any psychotherapist. LT B conducted a short mental health screening examination of the appellant to determine whether his referral to the mental health department was required. It was

standard practice for the duty ER doctor to conduct the examination when any patient appeared for evaluation.

We are not persuaded by the appellant's contention that LT B's ordering of the mild tranquilizer Ativan evidences his role as a psychotherapist or assistant to a psychotherapist. The record reveals that LT B ordered the medication as a safety precaution due to the appellant's angry and agitated demeanor when he presented himself to the ER.

In *Jaffee v. Redmond,* 518 U.S. 1 (1996), the Supreme Court recognized a psychotherapist-patient privilege in federal courts. The Supreme Court held in *Jaffee* that conversations between a patient and therapist over the course of about fifty counseling sessions were protected from compelled disclosure in that civil case. We distinguish the principle of *Jaffe* from the appellant's case, as LT B's administration of a single mental health screening examination does not amount to protected counseling under *Jaffee*. Thus, LT B's actions constituted medical triage, not psychotherapy as contemplated by MIL. R. EVID. 513.

Additionally, LT B's warnings, and the preliminary nurse's explanation to the appellant that his communications would not be confidential, convince us that the appellant had no reasonable expectation of confidentiality or a psychotherapist/ patient relationship with LT B. Thus we find the military judge's findings of fact to be supported by the record and not clearly erroneous. The military judge did not abuse his discretion in admitting the appellant's statements to LT B because the MIL. R. EVID. 513 protections did not apply.

Multiplicity and Unreasonable Multiplication of Charges

The appellant asserts that Specification 2 of Charge II and Specification 1 of Charge III are multiplicious for findings because they similarly allege drinking in the presence of an enlisted member. In the alternative, he claims that they are an unreasonable multiplication of charges. Although the appellant did not raise either challenge until after the members returned findings, we find that he sufficiently raised the issues to warrant our review. We need only address the unreasonable multiplication of charges issue, as we find in the appellant's favor in this regard.

After applying the multipronged test for unreasonable multiplication of charges, we conclude that the Article 133

(Specification 2 of Charge II) and Article 134 (Specification 1 of Charge III) offenses were unreasonably multiplied. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002) (*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003) (summary disposition). First, the appellant objected at trial, but only after the members returned findings of guilty. Second, these charges are directed at the same criminal acts – drinking and getting drunk with an enlisted Marine. Third, by charging the appellant twice for the same conduct, the Government exaggerated the extent of his criminality. Fourth, the additional charge inappropriately exposed the appellant to an additional finding of guilty as well as two additional years of confinement. As to the last *Quiroz* factor, however, we find no evidence of prosecutorial overreaching. Accordingly, we conclude that Specification 2 of Charge II and Specification 1 of Charge III constitute an unreasonable multiplication of charges and we set aside the finding of guilty as to Specification 2 of Charge II (conduct unbecoming). In doing so, we note that our finding does not impact the sentencing landscape in this regard as the military judge had already determined the specifications "multiplicious for sentencing" purposes, and instructed the members that the offenses were one offense for purposes of sentencing. Record at 1154.

Sentence Reassessment

Having found the military judge provided the members with an inaccurate maximum sentence for sentence deliberations, we must reassess the sentence. We may only reassess a sentence to cure the effect of prejudicial error when we are confident that, absent any error, the sentence adjudged would have been at least a certain severity and when so convinced may affirm only a sentence of that magnitude or less. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006); *see also United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" the sentence, in favor of a sentencing rehearing. *Buber*, 62 M.J. at 479-80 (quoting *United States v. Riley*, 58. M.J. 305, 312 (C.A.A.F. 2003)).

Reducing the maximum sentence for the appellant's Article 133 conviction alters the sentencing landscape from the eleven-year confinement limit provided the members, to only five years after our corrective action. We find that this does not constitute a dramatic change in the penalty landscape. The

number of offenses and the conduct within those offenses remains unchanged from what the members considered during deliberations. Only the maximum punishment has changed. Accordingly, we are confident in reassessing the sentence. Additionally, as we noted when setting aside Specification 1 of Charge III due to an unreasonable multiplication of charges, there was no effect on the sentence landscape as the military judge had previously determined the fraternization specification "multiplicious for sentencing."

After carefully considering the entire record, we are satisfied beyond a reasonable doubt that, absent any error, the members would have adjudged a sentence of at least three years confinement and a dismissal from the Marine Corps. In reaching our conclusion, we pull from our collective experience with the level of sentences imposed for such convictions for an officer's sexual activity and alcohol related fraternization with under-age enlisted service members given this context. We note that the sentence as reassessed is well-below the maximum punishment of five years confinement, and below the four years confinement the members adjudged.[8]

Conclusion

Accordingly, we dismiss Specification 2 of Charge II. The findings of guilty for the remaining charges and specifications are affirmed. After reassessment of the sentence, we affirm confinement for three years and a dismissal.

Chief Judge REISMEIER and Senior Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court

[8] We note that the military judge instructed the members that they may impose a loss of lineal numbers upon the appellant as an authorized punishment. Record at 1151. However, a loss of lineal numbers is no longer an authorized punishment under R.C.M. 1003(b). The appellant's approved court-martial punishment did not include a loss of lineal numbers. The appellant alleges no prejudice and we find none.